

Digging into RSA 155-E

An Overview of the State's Earth Excavations Law

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Agenda

- Overview of RSA 155-E and Amendments
 - Prohibited Excavations
 - Permit Exemptions
 - Grandfathered
 - Abandoned Operations
- Role/Responsibility of the Regulator
- Role/Responsibility of the Operator
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What is RSA 155-E?

- Simply put, it is the state law that governs the excavation of sand and gravel, specifically the “commercial taking of earth”.
- RSA 155-E was enacted on August 24, 1979 by the state legislature. There are a few reasons behind the intent of the law:
 - 1.To grant municipalities the authority to regulate earth excavation operations within their communities.
 - 2.To grant municipalities the power to enact more stringent standards than those outlined in 155-E.
 - 3.To bring lawfully existing operational gravel pits into some kind of compliance with state and local regulations.

What is RSA 155-E?

4. The legislature's language states in part,

“The general court finds that availability of construction material affects the cost of roads and other governmental infrastructure. Whenever the supply shrinks, prices increase. Although New Hampshire has an abundance of sand, gravel, and ***deposits suitable for production of construction aggregate, their availability is being curtailed by development, over-regulation, or both*** (emphasis added). Making up for dwindling supply raises the cost of production and transportation. This in turn raises the cost of roads and other public infrastructure. Additionally, it is clear that the existing local regulatory scheme needs clarification. Useful material is available only where it has been deposited, and if it must be transported long distances, the cost of construction increases. Thus, existing sources of supply must be identified and utilized, without undue disruption of local land use plans and patterns, without creating simultaneous state and local regulations of the same activity, ...”

What is RSA 155-E?

- The law invests the authority with the Planning Board to be the named Regulator, unless a town meeting vote or vote of the City Council authorizes the Board of Selectmen, City Councilors, or the Zoning Board of Adjustment to serve as the regulator.
- The law allowed a two year window prior to 1979 for gravel pits/operations to prove they were in lawful existence by August 24, 1977.

**The law is clear in that the municipality shall regulate the excavation of all earth materials to be used for construction aggregate.

Amendments to RSA 155-E 1989 and 1991

- In 1989 amendments were added setting certain standards for operating and reclaiming a pit and the enforcement of these standards. These standards were not part of the original 1979 legislation, but added in 1989.
- In 1991, the 1989 standards were further defined as "Minimum" and "Express" standards:
 - Operations that DO require a permit are subject to comply with the "Minimum" standards
 - Operations that DO NOT require a permit are subject to comply with the "Express" standards.

Note:* More stringent standards may be applied, should the regulator determine that they would be necessary and consistent with the intent of the regulations.

Amendments to RSA 155-E 1989 and 1991

- The 1991 revisions also make clear that if highway excavations and excavations connected with stationary manufacturing and processing plants (both exempt from permits) do not comply with the express operational and reclamation standards, they shall lose their non-permit status and be required to obtain a permit before continuing operations.
- The operational standards address such issues as setbacks from abutters, maintenance of vegetation, drainage, storage of fuels, etc. The 1991 revisions include provisions for setbacks from ponds, rivers, streams and wetlands.
- The reclamation standards require that within 12 months of the completion of an excavation operation, the area must be reclaimed, with attention paid to reseeding, disposal of debris, grading of slopes, and drainage.

Prohibited Excavations

These are conditions under which no operation would be permitted:

- 1. The excavation would be unduly hazardous or injurious to the public welfare.*
- 2. It would substantially damage a known aquifer.*
- 3. It would violate the operational standards, or could not comply with the reclamation standards.*
- 4. Where existing visual barriers would be removed.*

Who's Exempt from Permitting?

155-E:2

- I. Existing Excavations - if the operation was in lawful existence prior to August 24, 1979 (remember the law allowed a 2-year period prior to 1979 for an operation to be lawful so it would be August 24, 1977)
- II. Abandoned Excavations
- III. Stationary Manufacturing Plants
- IV. Highway Excavations

Practice Pointer: It is important to remember while 155-E provides for exemptions for permitting, that does not mean that those operations are exempt from reclamation and local regulations.

Who's Exempt from Permitting?

155-E:2-a Other Exceptions.

- I. No permit shall be required for the following types of excavations:
 - a) Excavation that is exclusively incidental to the construction or alteration of a building or structure or the construction or alteration of a parking lot or way including a driveway on a portion of the premises where the removal occurs; provided, however, that no such excavation shall be commenced without a permit under this chapter unless all state and local permits required for the construction or alteration of the building, structure, parking lot, or way have been issued.
 - b) Excavation that is incidental to agricultural or silvicultural activities, normal landscaping, or minor topographical adjustment.
 - c) Excavation from a granite quarry for the purpose of producing dimension stone, if such excavation requires a permit under RSA 12-E.
- II. A person owning land abutting a site which was taken by eminent domain or by any other governmental taking upon which construction is taking place may stockpile earth taken from the construction site and may remove the earth at a later date after written notification to the appropriate local official.

Who's Grandfathered?

What exactly does it mean to be “grandfathered”?

- **RSA 155- E** defines an existing excavation as one from which “earth materials of sufficient weight or volume to be commercially useful has been removed during the two-year period before August 24, 1979. So the operator actually can go back to August 24, 1977 to determine the status of their existing excavation.
- If an excavation operation **were lawfully** (that means in compliance with the existing zoning laws of the time) in business at any time between August 24, 1977 and August 24, 1979, it would be exempt from a permit.
- **Remember-** being exempt from permit requirements does not mean they are exempt from reclamation standards either in 155-E or in local regulations.


What is an Abandoned Operation?

- No earth material of sufficient weight or volume to be commercially useful has been removed from that excavation site during any 2-year period, either before, on, or after August 4, 1989; provided, however, that before the end of such 2-year period.
- The excavation site is in use and is not an excavation or excavation site as described in RSA 155-E:2, III, but does not conform with the incremental reclamation requirement of RSA 155-E:5-a, or the owner or operator has not posted a bond or other security and submitted a reclamation timetable to be approved by the regulator.
- The owner or operator of the excavation has neither secured a permit pursuant to this chapter nor filed a report of an existing excavation pursuant within the prescribed period.

The Role/Responsibility of the Regulator


- Know the law
- Educate yourselves on applying the law and processing applications
- If you are unsure, engage a 3rd party to assist you
- Adopt local Excavation Regulations
 - Define “commercial taking” of earth
 - Any material over (_____) cubic yards leaving the property which has a productive use at some other location...”
 - Define “incidental”
 - # of cubic yards per year, number of truck trips
- Can you require the stockpiling of topsoil for reclamation?
- Reclaiming a pit without using topsoil

Topsoil and Vegetation



Natural Resources Conservation Service

Technical Note
PM-NH-21
Rev April 1991
Rev April 2000

Vegetating
New Hampshire
Sand and Gravel Pits



**Seeding
Fact
Sheet**

 U. S. Department of Agriculture
Soil Conservation Service
Durham, New Hampshire

**Concerns Regarding the Use of
Topsoil in Gravel Pit Reclamation**

TOPSOIL FACTS

A one inch depth of topsoil spread over one acre equals 134 cubic yards.

A four inch depth of topsoil spread over an acre equals 536 cubic yards.

It takes 35.7 dump truck loads (15 cubic yards per load) to haul four acre inches of topsoil to a site.

A ten acre site (4 inch depth) requires 357 truck loads of topsoil.

Four inches of topsoil spread on a site that is one acre in size costs about \$8400.

536 yds ³ at \$12/yd ³	=	\$6432
Trucking at \$3/yd ³	=	\$1608
Spreading at \$0.75/yd ³	=	\$ 402
Total cost per acre	=	\$ 8442

A ten acre site costs about \$84,000 to topsoil to a four inch depth.

Topsoil is not needed on most gravel pit surfaces in order to establish warm season grasses. It is needed where cobbles or clean gravel are exposed.

The Role/Responsibility of the Regulator

- Address excavation in the Zoning Ordinance?

When the excavation is not permitted by zoning or other applicable ordinance...excavation shall be deemed to be a use allowed by special exception...in **any non-residential areas** of the municipality, and the zoning board of adjustment shall grant such a special exception upon a finding that:

- a. The excavation will not cause a diminution in area property value or unreasonably change the character of the neighborhood;
- b. The excavation will not unreasonably accelerate the deterioration of highways or create safety hazards in the use thereof;
- c. The excavation will not create any nuisance or create health or safety hazards; and
- d. The excavation complies with such other special exception criteria as may be set out in applicable local ordinances.

- Do you need to address excavation in the Master Plan?
- Conduct an inventory of existing pits
- Conduct site visits
- How to handle compliance issues

The Role/Responsibility of the Operator

- Understand the law and whether it applies to you
- Provide the Regulator with enough information to make a good decision
- Do you need any state permits?

Department of Environmental Services

- Alteration of Terrain Permit for disturbance of 100,000 square feet and over (unless within the Protected Shoreland, then 50,000 square feet)
 - RSA 485-a:17 [Section 485-A:17 Terrain Alteration. \(state.nh.us\)](#)
 - RSA 483-B:9 [Section 483-B:9 Minimum Shoreland Protection Standards. \(state.nh.us\)](#)

Department of Revenue Administration

- Intent to Excavate
 - All operators must file a Notice of Intent to Excavate at the beginning of each tax year and prior to excavating. (\$100 to DRA if over 1,000 cubic yards)
 - Notice provides an estimate of materials expected to be excavated over the year.
- Report of Excavated Material
 - Filed at the end of the year or no later than 30 days following the completion of the excavating, this form reports the actual amount of materials excavated over the past year.
- Excavation Tax
 - \$.02 per cubic yard for all materials sold or used on another parcel that is not contiguous and in common ownership(assessed by the municipality).

Relevant Court Cases

- Goffstown v. Thibeault (1987)
- **Wolfeboro v. Smith (1989)**
- **Town of Barrington v. Gadd (1990)**
- Olson v. Town of Fitzwilliam (1990)
- Town of Raymond v. S.S. Jay Realty (1994)
- Arthur Whitcomb, Inc. d/b/a Twin Mountain Sand & Gravel v. Town of Carroll, N.H. (1996)
- Cormier v. Town of Danville ZBA (1996)
- NBAC Corp v. Town of Weare (2001)
- **Guildhall Sand & Gravel v. Town of Goshen (2007)**
- Batchelder v. Plymouth ZBA (2010)
- Bedard v. Town of Alexandria (2010)
- **Town of Carroll v. Rines (2012)**

Wolfeboro v. Smith (1989)

- Property owner must prove that excavation activities were being conducted prior to passage of RSA 155-E
- Owner claimed grandfather rights to extend an existing legal excavation to a new area.
- **Court Response:**
 - Lateral expansion only considered a continuation if the land had been previously appropriated for excavation prior to RSA 155-E (1979)
 - Intent of the law to limit excavation without a permit when the intensity would have a substantially different impact on the neighborhood.
- **Burden of Proof (Not met by defendant):**
 - Excavation was active when RSA 155-E became effective
 - The new area was clearly intended to be excavated (objective evidence, not merely intent)
 - Continued operations do not/will not have a substantially different and adverse impact on the neighborhood

Town of Barrington v. Gadd (1990)

- Property owner must prove more than intent to qualify as grandfathered
- Owner claimed grandfathered right to continue excavation
- Actual activity since 1979 amounted to @800 yards of loam, some stockpiled, some battered away
- **Court Finding:** The sporadic taking of insignificant quantities of materials...does not constitute an excavation operation...Just because the defendants wish they had an active mineral extraction operation...does not make it so.”

Guildhall Sand & Gravel v. Town of Goshen (2007)

- The court concluded that some types of excavations, such as stationary manufacturing plants:
 1. Do not require a local permit under [RSA 155-E](#).
 2. The standards in [RSA 155-E](#) provide the controlling specifications for the operation.
 3. No local ordinance may contradict or impose a more restrictive standard.
- However, as to all other excavations, a local permit is required, and the statute authorizes local regulators (planning boards) to create their own regulations, provided they are at least as stringent as the minimum standards contained in the statute

Town of Carroll v. Rines (2012-2013)

- RSA 155-E requires excavation operators to obtain a permit through the local regulator (usually the Planning Board), but exempts certain categories of excavations from the permitting requirement.
- The two types of excavation operations with this plaintiff are among those exempt categories. RSA 155-E:2; RSA 155-E:2-a. Thus, the operator did not require any permit at all under RSA Chapter 155-E for the excavations.
- The Town claimed that the operator still required a variance from the Zoning Board of Adjustment because excavation was not permitted in that zone under the local zoning ordinance.
- Plaintiff argued they did not need a variance because the zoning ordinance did not say it was required.

Town of Carroll v. Rines (2012-2013)

- **Land Uses**-The Court quickly dispatched the plaintiff's first argument. Stating the zoning ordinance is “permissive,” and it is intended to prohibit all uses except those expressly permitted or incidental to uses so permitted.

Therefore, while excavation incidental to constructing a building was permitted as “incidental to” the permitted building, excavation related to a highway was not permitted at all in that zone and required a variance.

- **Preemption**-The Court looked to RSA 155-E:2, IV, which states in part “...such excavation [performed exclusively for certain highway purposes] shall not be exempt from local zoning or other applicable ordinances...” unless an exemption is granted by the State Department of Transportation.

Meaning, while municipalities cannot alter the statute as it applies to the operational and reclamation standards for those types of excavations (exempt), local regulations applicable to highway excavation is not preempted unless an exemption from those regulations is granted.

Resources

- Local Regulation Excavations
 - RSA [155-E](#)
- NH OSI Resource Library
- NH Municipal Association
- Southwest Regional Planning Commission.
 - [A Handbook for New Hampshire Municipalities](#)
- USDA-NRCS - Vegetating NH Sand and Gravel Pits

RSA 155-E:
THE LAW GOVERNING EARTH
EXCAVATIONS

*A HANDBOOK FOR NEW HAMPSHIRE
MUNICIPALITIES*



COMMISSION



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